Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ROY VAN WYK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether expert testimony is admissible where the field of expertise is not reliable.

Whether the six level sentence enhancement in U.S.S.G. § 2A6.1(b)(1) may be imposed where there is no evidence of the defendant's intent to carry out the threats.

Whether a sentence may be increased pursuant to U.S.S.G. § 5K2.3 without any evidence or discussion of the "normal" psychological injury resulting from commission of the offense.

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Petitioner, Roy Van Wyck ("Petitioner"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported (App. B). The September 19, 2000 opinion of the United States District Court for the District of New Jersey is unreported (App. D), and the February 8, 2000 opinion of the United States District Court for the District of New Jersey is reported at *United States v. Van Wyk*, 83 F. Supp. 2d 515 (D.N.J. 2000) (App. F).

STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit entered its judgment on March 29, 2001. This petition is timely filed within 90 days of the judgment.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371 provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 875(c) provides, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person —
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Federal Rule of Evidence 702 governs testimony by experts and provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and the (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702.

United States Sentencing Guideline § 2A6.1 provides in relevant part:

> (a) Base Offense Level: 12
>
> (b) Specific Offense Characteristics.
>
> (1) If the defendant engaged in conduct evidencing an intent to carry out such threat, increase by 6 levels.

U.S.S.G. § 2A6.1

United States Sentencing Guideline § 5K2.3 provides:

> If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.
>
> Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns.

> The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

U.S.S.G. § 5K2.3

STATEMENT OF THE CASE

Mr. Van Wyck was arrested under a federal arrest warrant on April 27, 1999. He was charged in a one count indictment for the possession of a firearm by a convicted felon. The indictment was assigned to the Honorable William G. Bassler, U.S.D.J.

A four count superceding indictment was returned on November 8, 1999. Count one charged conspiracy to make threatening communications. Counts two and three charged substantive violations of making threatening communications. Count four, which charged possession of a firearm and ammunition by a convicted felon, was severed on January 12, 2000.

Prior to trial, Mr. Van Wyck moved to exclude the testimony of the government's proposed expert witness, Agent James Fitzgerald, a forensic stylist or text analyst, on the basis that his field was not reliable.

Trial commenced on February 1, 2000, and the district court conducted a hearing pursuant to Federal Rule of Evidence 104 to determine the admissibility of Mr. Fitzgerald's testimony. Although the district court recognized the lack of reliability in the field, it nonetheless permitted Mr. Fitzgerald to testify at trial regarding his comparison of the known and unknown writings,

the similarities he found and the significance of those similarities (App. E & F). While the district court precluded Mr. Fitzgerald from offering his concluding opinion regarding authorship of the unknown writings, it was obvious to the jury that his expert opinion was that Mr. Van Wyk was the author.

The trial continued, and the jury returned a guilty verdict on all three counts on February 9, 2000.

Mr. Van Wyck pled guilty to count four on February 15, 2000.

The United States Probation Office prepared a presentence report, which proposed a six level enhancement pursuant to § 2A6.1(b)(1) of the Sentencing Guidelines. Mr. Van Wyck objected to the enhancement, asserting that there was no evidence of intent to carry out his threats and that his conduct did not meet the standards necessary for the enhancement.

The district court sentenced Mr. Van Wyck on September 19, 2000, applying the six level enhancement for intent to carry out threats and also upwardly departing three levels for extreme psychological injury. Mr. Van Wyck was sentenced to 188 months in prison (App. C & D).

Mr. Van Wyck filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit on September 26, 2000.

On March 29, 2001, the United States Court of Appeals for the Third Circuit affirmed the judgment below (App. A & B).

Mr. Van Wyck now files this timely petition for a writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE LAW AS ESTABLISHED BY THE RELEVANT DECISIONS OF THIS COURT AND BY THE OTHER CIRCUIT COURTS THAT HAVE DEALT WITH THE IMPORTANT ISSUES PRESENTED HEREIN.

A. Expert Testimony

"In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.' " *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). In *Kumho*, this Court extended *Daubert's* gatekeeping obligation from scientific testimony to all expert testimony. *Id.*

In determining whether expert testimony is admissible, a trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In doing so, a trial judge should consider the following factors: whether a theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; whether there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within the relevant scientific community. *Id.* at 593-94; *see also Kumho*, 526 U.S. at 149.

In this case, the trial judge acknowledged that "no case law, treatise, or law review article has dealt with the precise issue of whether the examination of text analysis to resolve a litigated question related to disputed authorship or meaning, or forensic stylistics, constitutes sufficiently reliable scientific evidence admissible in court." *United States v. Van Wyk*, 83 F. Supp. 2d 515, 520 (D.N.J. 2000).

Indeed, in *United States v. Clifford*, 704 F.2d 86, 88 (3d Cir. 1983), the government did not even attempt to offer expert testimony because forensic linguistic analysis did not provide a positive means of identification and was used only for investigative purposes. In deciding whether to admit cursive correspondence offered by the government, the trial judge stated that "forensic linguistic analysis 'has not been shown to be trustworthy, reliable, accurate, or conforming to generally accepted scientific theory.' " 704 F.2d at 89. The judge further stated that he had been unable to find any cases in which such testimony has been permitted and specifically pointed to *United States v. Hearst*, 412 F. Supp. 893 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978), where forensic linguistic testimony was not permitted.

Similarly, in *United States v. Salameh*, 54 F. Supp. 2d 236, 251 (S.D.N.Y. 1999), the court rejected the defendant's offer of testimony from a linguistic expert concerning the defendant's writing skills, opining that the proposed testimony was "both immaterial and speculative and would not have been admitted into evidence."

Additionally, only one forensic stylistics publication was offered by the government — the McMenamin article. 83 F. Supp. 2d at 521. Upon reviewing that article, the trial

judge stated, "Due, however, to the dearth of published cases or journals addressing forensic stylistics, the novelty of this field, and the fact that it has only been approved by law enforcement, the Court has no way of determining whether the McMenamin article is merely self-legitimized." *Id.*

The court further noted that "neither Fitzgerald nor the Government has been able to identify a known rate of error, establish what amount of samples is necessary for an expert to be able to reach a conclusion as to probability of authorship, or pinpoint any meaningful peer review" and "there is no universally recognized standard for certifying an individual as an expert in forensic stylistics." *Id.* at 522.

Based upon the foregoing, the trial judge precluded the expert from testifying that Mr. Van Wyk was the author of the questioned writings. However, the court nonetheless permitted Mr. Fitzgerald to testify at trial regarding his comparison of the known and unknown writings, the similarities he found and the significance of those similarities.

Once the court determined that the field of forensic stylistics was unreliable, it should not have permitted the witness to testify concerning any issue. Although the expert was not permitted to state his conclusion on authorship, it was obvious to the jury that his expert opinion was that Mr. Van Wyk was the author of the questioned writings.

Moreover, because the testimony came from an expert with impressive credentials in law enforcement, the jury likely gave his testimony significant weight. Thus, the testimony should also have been excluded pursuant to Federal

Rule of Evidence 403 because any probative value it may have had was substantially outweighed by its risk of undue prejudice and misleading the jury.

Finally, if the proffered testimony simply reiterates facts already within the common knowledge of the jury, the testimony should be excluded. *See United States v. Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995). Here, the expert testimony was unnecessary and should have been excluded because the jury clearly was capable of comparing the writings for similarities and drawing its own conclusions. *Clifford*, 704 F.2d at 90.

B. Intent to Carry Out Threats

The district judge applied the six level sentence enhancement of U.S.S.G. § 2A6.1(b)(1), finding that Mr. Van Wyk's actions evinced an intent to carry out his threats. However, that finding was not based upon credible evidence. In fact, Mr. Van Wyk's conduct over the years, with no acts in furtherance of his threats, actually contradicts the court's conclusion.

"The majority of circuit courts require that a defendant engage in some form of overt act before sustaining a § 2A6.1(b)(1) enhancement." *United States v. Goynes*, 175 F.3d 350, 353 (5th Cir. 1999). A holding that threats are enough to support an enhancement would contradict the plain language of the guideline which requires conduct evidencing an intent to carry out the threats. *Id.* at 355. Multiple threats are also insufficient for the enhancement. *Id.*

Thus, the court in *Goynes* held that "the writing of multiple threatening letters and the nature of their content

alone are insufficient to justify the district court's enhancement." *Id.* The letters written by the defendant in *Goynes* were "extremely violent" and one was "signed in blood." *Id.* Although the court found that conduct disturbing, it nonetheless stated that it was not "an actual step toward the realization of Goynes' threats." *Id.*

Similarly, in *United States v. Sovie*, 122 F.3d 122, 129 (2d Cir. 1997), the Second Circuit vacated the district court's six level enhancement. The court held that possession of the victim's address and phone number was insufficient to support the enhancement. *Id.* The court further rejected the fact that the defendant had arrived for a prearranged meeting with the victim because the meeting was at the victim's initiative. *Id.*

Here, Mr. Van Wyk did not engage in any overt act. Additionally, Mr. Van Wyk knew where his victims lived and worked, yet he did not attempt to carry out any of his threats of harm. Thus, the court's imposition of the six level enhancement in U.S.S.G. § 2A6.1(b)(1) was clearly erroneous.

C. Extreme Psychological Injury

The district judge also upwardly departed three levels pursuant to U.S.S.G. § 5K2.3, finding that Mr. Van Wyk's victims suffered severe psychological injury much more serious than normally resulting from commission of the offense. However, the court failed to identify the psychological injury that would normally result from the threats and, thus, provided no level of comparison.

First, the government bears the burden of proving that the facts of a case warrant an upward departure. *See, e.g., United States v. Okane*, 52 F.3d 828, 835 (10th Cir. 1995) (citing *United States v. Zamarripa*, 905 F.2d 337, 341 (10th Cir. 1990)). Second, before a court may upwardly depart under § 5K2.3, there must be evidence of: (i) the injury actually suffered by the victims, and (ii) "the psychological injury 'normally resulting from the commission of the offense.' " *Id.*

The government must present the court with evidence of the normal level of injury sustained under the circumstances, and the court must render findings as to the normal level of injury resulting from the circumstances. *Id.*

In *Zamarripa*, the court remanded because the government failed to carry its burden of providing the sentencing court with the evidence of the normal level of injury. *Id.* In *Okane*, the court remanded because even if the sentencing report contained sufficient evidence, the record was devoid of any findings as to the normal level of injury. *Id.*

"Thus, a court invoking the authority of § 5K2.3 must find that a victim suffered psychological injury 'much more serious than that normally resulting from the commission of the [particular] offense' for which the defendant is being sentenced." *United States v. Jacobs*, 167 F.3d 792, 799 (3d Cir. 1999) (quoting *United States v. Neadle*, 72 F.3d 1104, 1111-12 (3d Cir. 1996)). The sentencing court in *Jacobs* found that the victim had suffered posttraumatic stress disorder, mood disorders, depression, anxiety and sleeplessness; that "her condition constituted 'a substantial impairment of her psychological emotional function;' and

that the 'impairment manifests itself by physical or psychological symptoms or changes in behavioral pattern.' " *Id.* The Third Circuit nonetheless remanded the case for lack of evidence that "the harm suffered [was] above the level of, or more serious than that normally experienced by a victim of an aggravated assault." *Id.* n.6.

Similarly, the record here is devoid of evidence as to the normal level of psychological injury attributable to the victims of threatening conduct. Therefore, the court's finding that the victims suffered extreme" psychological injury is clearly erroneous and should not be sustained. *Id.*

CONCLUSION

For all of the above reasons, Petitioner respectfully requests that his petition for a writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2867

UNITED STATES OF AMERICA

v.

ROY VAN WYK,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 99-cr-00217)
District Judge: Honorable William G. Bassler

Argued March 12, 2001

Before: ALITO, RENDELL, *Circuit Judges*, and
SCHWARZER,* *District Judge*.

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 12, 2001. On consideration whereof, it is now here

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* Hon. William W. Schwarzer, Senior Judge of the United States District Court for the Northern District of California, sitting by designation.

Appendix A

ORDERED and ADJUDGED by this court that the Judgment and Conviction Order of the District Court entered on September 21, 2000, is hereby AFFIRMED.

All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: March 29, 2001

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2867

UNITED STATES OF AMERICA

v.

ROY VAN WYK,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 99-cr-00217)
District Judge: Honorable William G. Bassler

Argued March 12, 2001

Before: ALITO, RENDELL, *Circuit Judges*, and
SCHWARZER,* *District Judge*.

(Filed March 29, 2001)

* * *

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* Hon. William W. Schwarzer, Senior Judge of the United States District Court for the Northern District of California, sitting by designation.

Appendix B

MEMORANDUM OPINION

RENDELL, *Circuit Judge.*

On February 9, 2000, Roy Van Wyk was convicted, after a jury trial, of one count of conspiracy to make threatening communications in violation of 15 U.S.C. § 371, and two substantive counts of making threatening communications, in violation of 18 U.S.C. § 875. Van Wyk also later pled guilty to a fourth count — possession of a firearm and ammunition by a convicted felon — which had been severed from the other three counts.

On appeal, Van Wyk argues that the District Court erred by admitting the expert testimony of a text analyst at trial, by imposing a six level enhancement pursuant to § 2A6.1(b)(1) of the Sentencing Guidelines, and by upwardly departing three levels pursuant to § 5K2.3 of the Guidelines. We will affirm.

Van Wyk was convicted for repeatedly threatening two women, GW[1] and MJ. At trial, there was also additional testimony by two other women who claimed that Van Wyk had also threatened them. Van Wyk met his first victim, GW, in 1984. He terrorized her for a period of fifteen years, including the following behavior: threatening to kill her, slashing her tires, vandalizing her car, sending her threatening letters indicating that he had been watching her, making repeated harassing phone calls to her, and threatening to come to her office with a gun and shoot himself. In 1998, GW

1. As the District Court did, we will refer to the victims using only their initials.

received a letter containing personal information of hers — including her social security number, license plate numbers, and information on her tenant. The bottom part of the letter threatened her with physical assault and the firebombing of her house.

The other victim Van Wyk was charged with threatening was MJ, who met him in March 1997. Van Wyk was doing landscaping work near MJ's house, and they had a disagreement regarding parking vehicles near MJ's driveway. After this incident, MJ began receiving threatening phone calls, including one from a woman in October 1997, in which the caller threatened to kill her. This phone call was placed from an out-of-state pay phone using the stolen credit card of one of Van Wyk's neighbors. The following morning, GW discovered swastikas painted on her husband's car.

Van Wyk was arrested on April 27, 1999. Prior to trial, Van Wyk moved to exclude the testimony of the government's proposed expert witness, FBI Special Agent James Fitzgerald, who was offered as an expert in text analysis, which studies patterns of variation in written language. The District Court conducted a *Daubert* hearing, and decided to permit the defendant to testify regarding his area of expertise — specifically, he was able to point out to the jury the similarities between writings known to have come from Van Wyk and writings with unknown authorship, and also to explain the significance of these similarities in determining authorship. Although it permitted Fitzgerald to testify, the District Court limited the scope of his testimony, prohibiting him from offering his opinion as to the identity of the author of the unknown writings.

Appendix B

On February 9, 2000, the jury found Van Wyk guilty as to all three counts. On September 19, 2000, the District Court sentenced him to 188 months in prison for these offenses, imposing an enhancement suggested by the Presentence Report pursuant to U.S.S.G. § 2A6.1(b)(1), for an intent to carry out his threats, which Van Wyk objected to, and also upwardly departing for inflicting extreme psychological injury on his victims pursuant to U.S.S.G. § 5K2.3. On appeal, Van Wyk argues 1) that Agent Fitzgerald should not have been permitted to testify, 2) that the record did not support the § 2A6.1(b)(1) enhancement applicable when an intent to carry out threats is demonstrated, and 3) that there was insufficient evidence to support the § 5K2.3 departure due to a lack of evidence demonstrating that the victims' injuries were more serious than would normally be expected.

The District Court had subject matter jurisdiction under 18 U.S.C. § 3231, and we have appellate jurisdiction pursuant to 18 U.S.C. § 3742(a). We review the District Court's decision to admit expert testimony and the departure pursuant to §5K2.3 for extreme psychological injury for abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (addressing expert testimony); *United States v. Queensborough*, 227 F.3d 149, 158 (3d Cir. 2000) (regarding decision to depart from Guidelines). With respect to the District Court's finding that Van Wyk demonstrated an intent to carry out his threats, the standard of review is clear error. *United States v. Green*, 25 F.3d 206, 211 (3d Cir. 1994).

Appendix B

I. Admission of Expert Testimony

Federal Rule of Evidence 702 covers the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Hence, the Rule has three requirements: (1) the proffered witness must qualify as an expert by knowledge, skill, experience, training, or education; (2) the expert must testify to scientific, technical, or other specialized knowledge; and (3) the expert's testimony must assist the trier of fact. *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir. 1995). A recent case described these requirements as "three distinct substantive restrictions . . . : qualifications, reliability, and fit." *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000). Van Wyk focuses his appeal on the second requirement, arguing that Fitzgerald's testimony should not have been admitted because it is unreliable.

Van Wyk bases this contention on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which set forth factors to determine whether to admit expert scientific[2] testimony. In *Elcock*, we emphasized the importance of the

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2. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), extended *Daubert* to cover all expert testimony.

following *Daubert* factors: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. 233 F.3d at 745-46.

Following the direction of *Daubert*, the District Court made a "preliminary assessment of whether the reasoning or methodology underlying the testimony [wa]s scientifically valid." 509 U.S. at 592. It examined the *Daubert* factors, and rejected Agent Fitzgerald's expert testimony regarding the identity of the author of the unknown writings, finding it unreliable. *United States v. Van Wyk*, 83 F. Supp.2d 515, 522 (D.N.J. 2000.). It based its decision on the failure of the field of text analysis to meet the following *Daubert/Kumho* factors: no known rate of error, no meaningful peer review, and the failure to establish the number of samples necessary for an expert to reach a conclusion as to probability of authorship. *Id.*

The Court did, however, allow Agent Fitzgerald to testify regarding his comparison of the writing style characteristics, or "markers," of Van Wyk's known writings and the documents of questioned authorship. It stated: "Fitzgerald's expertise in text analysis can be helpful to the jury by facilitating the comparison of the documents, making distinctions, and sharing his experience as to how common or unique a particular marker or pattern is." *Id.* at 524.

Appendix B

The Supreme Court has emphasized that the test of reliability is "flexible," *Kumho*, 526 U.S. at 141, and we have stressed that the key to the question of admissibility should turn on the testimony's "helpfulness to the trier of fact." *Velasquez*, 64 F.3d at 850. Van Wyk has not demonstrated that Fitzgerald's testimony failed to assist the jury, and we are mindful of the standard of review. We find that the decision to admit Fitzgerald's testimony for the purpose of assisting the jury is comparison between Van Wyk's writings and those of an unknown author was not an abuse of discretion, and therefore uphold the District Court's determination.

II. Enhancement for Intent to Carry Out Threats

The District Court applied a six-level enhancement under U.S.S.G. § 2A6.1(b)(1), which applies when "the offense involved any conduct evidencing an intent to carry out such threat." The District Court based its finding on the increasing severity of Van Wyk's threats. The Court believed that the pattern of harassment evidenced an intent to carry out his threats, most significantly with respect to GW: hang up phone calls at first, then vandalism of GW's car and home, followed by a threat in 1995 that his "game will climax like OJ" as well as both the December 1998 threats — one from the woman purporting to be Van Wyk's girlfriend, threatening to kill GW, and one sent shortly after the search warrant was executed, threatening to assault GW and firebomb her house. The District Court also focused on the fact that the latter threat described a great deal of GW's personal information. In addition, the District Court noted that a weapon was found when Van Wyk's apartment was

searched. The District Court then described MJ's death threat, emphasizing the severity of the threat and interpreting the painting of the swastikas on her car as evidencing an intent to carry out this threat.

On appeal, Van Wyk argues that because his harassment took place over the course of several years without any physical violence to the victims, the enhancement is inappropriate. He posits that the long duration of the threats contradicts the conclusion that he demonstrated an intent to carry out his threats.

We have only addressed the application of § 2A6.1(b)(1) once before, and in that case, we upheld the enhancement based on significantly less evidence. *See United States v. Green*, 25 F.3d 206, 210 (3d Cir. 1994) (finding that defendant's asking friend shortly after making threat to run check on victim's license plate to obtain victim's address constituted conduct evidencing an intent to carry out threats). Again, the standard of review is clear error, and we therefore will only reverse upon a determination that the District Court's factual finding was "completely devoid of a credible evidentiary basis or b[ore] no rational relationship to the supporting data." *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997). We do not have such a situation in the instant case. Rather, the District Court had ample factual support for its conclusion that § 2A6.1(b)(1) applied. We will affirm the enhancement.

Appendix B

III. Departure for Severe Psychological Injury

United States Sentencing Guideline § 5K2.3, an encouraged basis for departure, provides:

> If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.
>
> Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

We have previously addressed the application of § 5K22.3. In *United States v. Jacobs*, 167 F.3d 792, 798 (3d Cir. 1999), we held that a court invoking the authority of § 5K2.3 must make specific factual findings that a victim suffered psychological injury "much more serious than that

normally resulting from the commission of the [particular] offense" for which the defendant is being sentenced. *See also United States v. Neadle*, 72 F.3d 1104, 1111-12 (3d Cir. 1996) (stating that the record must support a finding that "the victims suffered psychological . . . harm, which exceeded that occurring in the heartland of fraud offenses, to such a degree as to justify an upward departure."). Because the district court in *Jacobs* found substantial psychological impairment but did not find that the victim's psychological injury was "much more serious than that normally resulting from the commission" of the crime of aggravated assault, we remanded for further findings. *Jacobs*, 167 F.3d at 798.

We again considered a § 5K2.3 departure in *United States v. Helbling*, 209 F.3d 226 (3d Cir. 2000). The district court in *Helbling* had made findings regarding the victims' psychological injury:

> The District Court found [that] [t]he Government has convincingly detailed the emotional and psychological costs of surviving Helbling's crimes and resisting his harassment. These costs included the humiliation of being forced to seek work at an advanced age and rely on help from family members, the trauma that comes with losing one's savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from the tax authorities.

Id. at 251. We found that the district court's findings were clearly supported by the record, which itself supported the

determination that Helbling caused psychological injury "much more serious" than would normally result from his type of fraudulent activity. *Id.* at 251-52.

In the instant case, the District Court characterized Van Wyk's actions as a "campaign of terror," calling it "prolonged and relentless." Supp. App. at 32. It stated that "GW has lived her life in constant fear of retaliation for having broken up with Defendant." *Id.* at 34. The District Court cited specific instances of the suffering of the victims as contained in the Presentence Report and trial testimony. For example, it noted that GW would walk out to her car in the morning shaking, that she would stay in the house if her husband was not around, and that she had to seek medical help due to the stress caused by Van Wyk. *Id.* at 51. The Court also noted that another victim had testified that Van Wyk had "destroyed [her] life and [her] sanity." *Id.*

Based on all of this evidence, we find that the District Court did not commit clear error in finding that the victims had suffered psychological injury "much more serious than that normally resulting from" making threatening communications.

IV. Conclusion

For all of the foregoing reasons, we will affirm the District Court's decision with respect to the three issues raised on appeal.

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TO THE CLERK OF COURT:

Please file the foregoing memorandum opinion.

s/ [illegible]
Circuit Judge

Dated: MAR 29 2001

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 19, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number: 2:99cr217-1

UNITED STATES OF AMERICA

v.

ROY VAN WYK

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ROY VAN WYK, was represented by John Yauch, AFPD.

The defendant pled guilty to count(s) 4 of the Superseding Indictment on 15 February 2000. The defendant was found guilty on count(s) 1,2, & 3 by a jury verdict on 9 February 2000 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

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Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:371	Conspiracy to defraud US-Threatening Communication	1/93-12/98	1
18:875 & 2	Interstate Communications — Threats to Persons	"	2-3
18:922(g) & 2	Possession of firearm by convicted felon	"	4

As pronounced on 19 September 2000, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $400.00, for count(s) 1,2,3 & 4, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

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Signed this the 19th day of September, 2000.

s/ William G. Bassler
WILLIAM G. BASSLER
United States District Judge

Defendant's SSN: 157-54-7100

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **188 Months**. This term consists of 48 months on each of **ct's 1,2, & 3** to run consecutive to each other & **44** months on **ct. 4** to run consecutive to ct's 1,2, & 3.

The defendant shall remain in custody pending service of sentence.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **3** years on each of **ct's 1,2,3, & 4** to run concurrent to each other.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

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The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall not possess, procure, purchase or otherwise obtain access to any form of electronic equipment such as police scanners, baby monitors, scanners capable of intercepting cordless telephone conversations. Based on frequent technological changes, this condition should be reviewed by the U.S. Probation Office at the time of the defendant's release from custody.

The defendant shall participate in a mental health program for evaluation and/or treatment if directed by the U.S. Probation Office. The defendant shall remain in treatment until satisfactorily discharged and with the approval of the U.S. Probation Office.

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The defendant is prohibited from having any contact (ORAL, WRITTEN OR OTHERWISE) with victims GW, MJ, LB & SK or any member of their family. Additionally, he is prohibited from inducing other individuals to contact these victims.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

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7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

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15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report. The court disagrees with the 2 level enhancement pertaining to 2A6.1 (b)(2) (paragraph 48 of presentence report — Group 2 of guideline calculations as it relates to victim MJ.

Guideline Range Determined by the Court:

Total Offense Level:	25 Departed to 30
Criminal History Category:	V
Imprisonment Range:	100 months to 125 months, departed to 151 to 188
Supervised Release Range:	2 to 3 years
Fine Range:	$ 10,000 to $ 100,000
Restitution:	$ n/a

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The fine is waived because of the defendant's inability to pay.

The sentence departs from the guideline range for the following reason(s): based on 5k2.0, 5k2.3 & 5k2.8 Extreme Psychological Injury +3 points(5k2.3) & Extreme Conduct +2 points(5k2.8). Court Departed 5 levels from 25 to 30.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 19, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Crim. No. 99-217 (WGB)

UNITED STATES OF AMERICA,

v.

ROY VAN WYK

Defendant.

MEMORANDUM OPINION AND ORDER

* * *

This matter comes before the Court for the sentencing of Defendant Roy Van Wyk, who has been convicted of three counts related to making interstate threatening communications in violation of 18 U.S.C. § 875. Defendant plead guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

The Government seeks numerous sentencing enhancements and upward departures, some of which Defendant contests. Only those that are contested are addressed by the Court. Defendant also makes a number of objections regarding the inclusion of information pertaining to the existence of

a lawsuit filed by Defendant's mother and Defendant's status as a named beneficiary of his mother's life insurance; because such information does not affect the Guidelines, the Court does not address these objections. For all other sentencing matters, except as otherwise noted, the Court accepts the Pre-Sentence Report ("PSR") as its findings of fact. *See* Fed. R. Crim. P. 32(b)(6)(B).

I. *BACKGROUND*

While Van Wyk was only indicted and convicted of three counts of making threatening communications in interstate commerce, the campaign of terror he perpetrated, and is still perpetrating upon his victims has been prolonged and relentless; this summary only sketches in broad strokes the facts of some of the crimes against certain of the individual victims.

A. *Victim GW*

Defendant and GW met at a party in 1984. They dated for a period of time. After a few months, GW discovered, by reading it in the newspaper, that Defendant had been arrested and charged with arson for burning the cars of certain police officers and others in retaliation for things that Defendant perceived were improperly done to him. Upon learning of the charges filed against Defendant, GW broke off her relationship with Defendant, thereby setting in motion the chain of events that occurred over the approximately next fifteen years. After Defendant's November 1984 bail release on the arson charges, GW's car began to be vandalized — the tires were punctured, windows were broken, and acid

was thrown on the car. This continued unabated while Defendant was out on bail awaiting trial and after his conviction, but before he reported to prison. This activity started again once Defendant was released from prison on January 12, 1993.

Additionally, GW received hundreds of hang-up telephone calls and received letters threatening her life. Apparently, advertisements offering GW's automobile for sale were placed in a newspaper, without GW's permission. Sexual enhancement supplements were sent to her home. Defendant, impersonating a police dispatcher on a police radio frequency, put out an alert that there had been a 911 call from GW's home, thereby prompting police to be dispatched to her home. Finally, on or about December 19, 1998, an interstate telephone call was placed from New York to GW in New Jersey using a stolen credit card number, which was written on a slip of paper recovered from Defendant's residence during the search. During the call, a woman threatened GW's life. As a result of all these events, GW has lived her life in constant fear of retaliation for having broken up with Defendant.

B. *Victims LB and SK*

LB and SK were also women who came in contact with Defendant under social circumstances and have had conduct directed against them that is strikingly similar to the harm experienced by GW. For instance, LB met Defendant in a restaurant where they began a conversation. LB gave Defendant her telephone number because he informed her he might be able to hire her occasionally in his business.

Within days, Defendant started his constantly calling LB, leaving threatening messages on her answering machine. LB ultimately told Defendant she did not want to date him. Subsequently, Defendant began a "campaign of harassment" against her including telephone calls, damage to her car, harassment of her family members, and other acts. Eventually, LB, fearing for her life, moved out of state.

C. *Victim MJ*

MJ was a homeowner who had a dispute with Defendant when Defendant repeatedly parked a piece of earth moving equipment in her driveway. Defendant refused to move the machine and mocked MJ. After a heated exchange occurred where Defendant referred to MJ as a "rich . . . jew bitch," MJ reported the events to the police. Defendant also filed a report and eventually swore out a complaint against MJ in municipal court. MJ countersued.

Sometime in October 1997, the municipal court judge dismissed Defendant's case against MJ, who then agreed to dismiss the charges against Defendant. As part of the dismissal, the court ordered that Defendant have no contact with MJ. The Government alleges that nevertheless, Defendant and another individual made an interstate telephone call to MJ and threatened her life. On the same night that MJ was threatened, swastikas were painted on a car in MJ's driveway. Spray paint of the same color was found during the search warrant executed at Defendant's residence.

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II. *DISCUSSION*

A. *Burdens*

As a preliminary matter, the burden is on the Government to prove by a preponderance of evidence facts to support a sentence enhancement. *United States v. Evans*, 155 F.3d 245, 253 (3d Cir. 1998). Although the burden then shifts to the defendant, the ultimate burden of persuasion remains with the Government. *Ibid.* In contrast, for a sentence reduction, the defendant bears the burden of proof. *United States v. Bennett*, 161 F.3d 171, 196 (3d Cir. 1998), *cert. denied*, 120 S. Ct. 61 (1999); *United States v. Price*, 13 F.3d 711, 735 (3d Cir. 1994), *cert. denied*, 511 U.S. 1096 (1994), 512 U.S. 1241 (1994), 513 U.S. 853 (1994), 512 U.S. 1023 (1996).

B. *Base Offense Level*

The 1998 United States Sentencing Commission Guidelines ("Guidelines"), Application note 2, at § 2A6.1 states in pertinent part, "[f]or purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under 3D1.2[1] (Groups of Closely Related Counts) . Multiple counts involving different victims are not to be grouped under § 3D1.2." (footnote added). Accordingly, as set forth in the PSR, the counts involving conspiracy and making a threatening communication against

---

1. U.S.S.G. § 3D1.2 provides that closely related counts "involving substantially the same harm" shall be grouped together for sentencing purposes.

GW (counts 1 and 2) will be treated as one group for sentencing purposes (Group 1), but because the conspiracy and threatening communications against MJ (counts 1 and 3) involve a different victim, those counts will be treated as a separate group for sentencing purposes (Group 2). PSR ¶ 38.

1. *Threatening Communications*

Under the Guidelines, the violations for making threatening communications are addressed in U.S.S.G. § 2A6.1(a)(1) and call for a base offense level of 12. The Pre-Sentence Report calculates a total offense level of 25 based on the following adjustments: (1) a 6 level increase for conduct evidencing an intent to carry out such threat, § 2A6.1(b)(1); (2) a 2 level increase for an offense involving more than two threats, § 2A6.1(b)(2); and (3) a 2 level increase for obstruction of justice, § 3C1.1. Defendant objects to the Government's request and Probation's recommendation for such enhancements to the base offense level.

a. *Intent to Carry Out Threat*

Section 2A6.1(b)(1) states that "[i]f the offense involved any conduct evidencing an intent to carry out such threat, any conduct evidencing an intent to carry out such threat, increase by 6 levels." Application note 2 to § 2A6.1(b)(1) provides:

> In determining whether subsections (b)(1), (b)(2) and (b)(3) apply, *the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense;*

> *however, the conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole.* For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

(emphasis added). In considering conduct that occurred prior to the offense, the Government argues that not only did Defendant make threats against GW and MJ, but also committed acts of vandalism against them as well. According to the Government, while Defendant made many such threats over the years and committed many acts of violence, Defendant's acts escalated in severity and violence over the years.

Defendant, however, objects to the six level enhancement by pointing out that during the many years in which he threatened and harassed his victims, he knew where the victims lived and worked and certainly could have harmed them if he had so desired, but that he did not do so. He concludes that, therefore, his conduct indicates that he never intended to physically harm his victims.

The Court agrees with the Government that the severity of Defendant's actions increased over the years and evidenced an intent to carry out the threats. Initially,

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Defendant harassed GW with hang up phone calls, letters describing the pain she caused him and containing a threat that her house would be burglarized. Defendant also threatened to kill himself at GW's workplace, and vandalized GW's car and home numerous times. Then, even his own words suggested that the series of threats and vandalism would continue to escalate and that he would eventually carry out his threats; in a letter that GW received on August 15, 1995, Defendant wrote these chilling words: "[m]y game will climax like OJ." Subsequently, on December 19, 1998, a message was left on GW's work voice mail by a woman claiming to be "Roy's girlfriend." The message stated that GW would be killed and ended with the words "die bitch." That threat eventually resulted in count 3 of the federal indictment. On December 22, 1998, a search warrant was executed and a weapon was found. Days later, GW received another letter containing GW's personal information including her date of birth, social security number, previous addresses, the name of her high school, information about the woman who rented an apartment in her house, and the names of her parents and the years of their deaths. Additionally, the letter threatened, among other things, "[i]f you show in court [to testify] we will beat you f***ing bitch and firebomb your red house."

On October 24, 1997, MJ received a death threat, which resulted in count 2 of the federal indictment. Defendant then heightened the severity of the threat and evidenced an intent to carry out the threat by painting swastikas on the car in MJ's driveway, which MJ discovered that very next morning. Such conduct, the Government contends, evidenced Defendant's capability and intent to carry out his threats.

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In *United States v. Morrison*, 153 F.3d 34, 52 (2nd Cir. 1998), the court found that in order for the six level enhancement to be invoked, " 'the conduct proffered as probative of such an intent must have occurred either contemporaneously with or after the threat.' " (citing *States v. Kirsh*, 54 F.3d 1062, 1073 (2nd Cir. 1995) (internal quotes omitted)). In *Morrison*, the court awarded the enhancement based on repeated threatening phone calls placed to the victims and their families after the threat that resulted in the defendant's conviction.

Here, as discussed above, Defendant continued to make death threats against both victims subsequent to the threats for which Defendant was convicted. The fact that, as Defendant argues, he did not actually carry out the threat is of no moment in determining whether he had an *intent* to carry out any threats; if Defendant had actually carried out any of his threats to kill, that would involve different charges altogether. Accordingly, the Court finds that with respect to the counts involving both GW and MJ, the six level enhancement for intent to carry out a threat is warranted.

b. *More than 2 Threats Against MJ*

Section 2A6.1(b)(2) states that "[i]f the offense involved more than two threats, increase by two levels." The Government seeks a two level adjustment to the base offense level for Defendant's conduct against each of the victims, MJ and GW. Defendant does not contest that the offense against GW involved more than two threats, *see* Def.'s July 31, 2000 Sentencing Memorandum ("Def.'s Opp'n"), at 5, n.5; however, Defendant argues that with respect to MJ,

a two level upward adjustment is inappropriate because there were fewer than two threats.

The Government believes that the first threat occurred when Defendant told MJ that "this is not over" after his harassment complaint against MJ in municipal court was dismissed. As the second threat, the Government points to the numerous hang-up calls to MJ that began immediately after the dismissal of the court action and culminated in the phone call by a woman threatening to kill MJ. Finally, the Government contends that the third episode was when Defendant painted swastikas on MJ's car.

Although Defendant concedes that the death threat was actually a "threat," Defendant claims that the other two incidents did not constitute "threats." He states that the statement "this is not over," was merely "an expression of his dissatisfaction with the outcome" of the court proceeding. Def.'s Opp'n, at 5. Defendant characterizes the painting of the swastikas as "simply an expression of his feelings toward" MJ. *Ibid.* While the Court does not agree with Defendant that the painting of the swastikas on MJ's car, particularly right after the death threat, is "simply an expression of his feelings," the Court does find that the statement "this is not over" could be construed merely as an indication of Defendant's intent to appeal the court's decision. Therefore, because the offense against MJ involved only two threats at best, a two level adjustment to the base offense level for offenses against MJ will not be imposed.

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c. *Obstruction of Justice for Offenses Against GW*

Defendant still faces a myriad of charges at the state level for which an indictment has been returned and for which he is scheduled to go to trial. The Government argues that in calculating the adjusted offense level for Group 1 (offenses against GW), a two point enhancement is appropriate pursuant to Sentencing Guideline § 3C1.1 for obstruction of the state trial after the conclusion of the federal trial. Section 3C1.1 provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

The Commentary to § 3C1.1 gives an example of the types of conduct to which the Guideline applies as "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." § 3C1.1 Application Note 4(a).

The Government provides two examples of Defendant's obstructive behavior. First, a list containing a number of male names was circulated in the jail so that women inmates can write to the males. Included on that list were many of the

police officers that investigated this case as well as witnesses who testified at the federal trial and who may testify at the state trial.

Second, by letter dated May 23, 2000, Defendant wrote a letter to GW's husband that stated in part,

> I was hoping you would have attended my trial in February at Federal Court, Newark. This way you could have listened to [GW]'s 4 ½ hour testimony. The prosecutor said [GW] did not want you there because you would hear of all the crimes she committed against me and my family including violence. I know you are from Sweden and your laws differ from the states. However, in the U.S. anyone is welcome to attend court proceedings unless otherwise told by the Judge. [GW] has to testify against me at several more trials in the next six months. These trials are as follows. A two week trial in Bergen County Superior Court, Hackensack. A one week trial at Bergen County District Court, Hackensack, which covers Rockleigh. There are also the court cases pending in Hillsdale Court which will be heard. I will advise you of the dates so you can attend and hear how evil [GW] is . . .

The Probation Office and the Government argue that Defendant was attempting to intimidate the victim once again. GW is scheduled to testify at the state trial.

In response, Defendant claims that the two level upward adjustment for obstruction of justice is inappropriate because

(1) he did not act with the specific purpose of impacting or interfering with the administration of his federal case, but rather, his actions "stem from his difficulty in letting go of past relationship," Def.'s Opp., at 3; and (2) the alleged obstruction occurred in a state proceeding instead of at the requisite "sentencing of the *instant* offense of conviction." § 3C1.1. The Court disagrees with Defendant on both issues.

While it may be true that Defendant's conduct arises out of or stems from an inability to let go of past relationships, the Court finds that the *purpose* was to threaten or intimidate potential witnesses, at least indirectly. In fact, as indicated in the PSR, GW was intimidated by Defendant's letter and told law enforcement officials that she would not testify at Defendant's upcoming state trial. PSR ¶ 36. Therefore, Defendant's actions fall within the ambit of § 3C1.1.

Next, Defendant maintains that his actions have not affected this proceeding and that unless the alleged obstruction influenced or affected this federal action in some way, § 3C1.1 is not applicable if the alleged obstruction occurred in a state proceeding. To support that contention, Defendant relies on a section of the Federal Sentencing Guidelines Handbook ("Handbook") that provides "the obstructive conduct must be material; that is, it must have some impact on the investigation or prosecution of the federal offense." Handbook, § 3C1.1, at 731-32. Defendant misconstrues the import of this section; it only requires that the alleged conduct be *material*. Moreover, Defendant's position that the obstructive conduct must have some impact on the federal action is contrary to other portions of the Handbook as well as to Third Circuit case law.

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The Handbook specifically provides, "[o]bstruction of a state investigation may warrant an enhancement of the federal sentence, even if the obstructive acts are not aimed at federal authorities." This is consistent with the Third Circuit's determination that "a § 3C1.1 enhancement is appropriate where the defendant has obstructed an investigation of the criminal conduct underlying the offense of conviction, even where the investigation was being conducted by state authorities at the time." *United States v. Imenec*, 193 F.3d 206, 209 (3d Cir. 1999).[2] Similarly, the Ninth Circuit, in upholding a § 3C1.1 enhancement for the obstruction of a state investigation, noted that there is "no state-federal distinction for obstruction of justice . . ." *United States v. Lato*, 934 F.2d 1080, 1083 (9th Cir.), *cert. denied*, 502 U.S. 897 (1991).

There must, however, be "some connection between the obstruction and the federal offense for which defendant is being sentenced." *Lato*, 934 F.2d at 1083. Here, Defendant concedes that some of the conduct charged in the state complaint overlap with the federally prosecuted charges. Although the state complaint also charges Defendant with other additional crimes, the Court agrees with the Probation

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2. Defendant erroneously concludes that his position is not undermined by the decision in *United States v. Imenec*, 193 F.3d 206, 209 (3d Cir. 1999). He claims that in that case, a § 3C1.1 upward enhancement was awarded because the federal proceeding was actually impacted — the defendant's flight on the state charges delayed his arrest on the federal charges; however, nowhere in *Imenec* does it state that the Circuit's decision to affirm the trial court's upward enhancement hinged on that fact or that that fact had even been considered by the court.

Office and finds that the federal and state offenses are close enough to warrant the two level enhancement for obstruction of justice.

c. *Violation of Court Order Protecting MJ*

On October 14, 1997, MJ dropped her lawsuit against Defendant, which was pending in Upper Saddle River Municipal Court. As part of the dismissal, the court ordered that Defendant have no contact with MJ. MJ received the death threat phone call on October 24, 1997. Accordingly, a two level upward enhancement is appropriate under § 2A6.1(b)(3).

2. *Possession of Firearm by Convicted Felon*

As for the violation of 18 U.S.C. § 922(g)(1), possession of a firearm by a convicted felon, (Group 3), the base offense level is 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A). He is ineligible for a reduction for acceptance of responsibility because he failed to accept responsibility for counts 1 through 3.

3. *Calculation of Total Base Offense Level*

For Group 1, the adjusted base offense level is 22. For Groups 2 and 3, the adjusted base offense level is 20. Pursuant to § 3D1.4, the combined offense level is 25, which remains unchanged from the calculation in the PSR.

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C. *Upward Departures to the Adjusted Base Offense Level*

In addition to the increased base offense level, the Government also seeks upward departures for extreme conduct and psychological injury.

In promulgating the Sentencing Guidelines, the Sentencing Commission intended that sentencing courts would "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993), quoting U.S.S.G. Ch. 1, Pt. A, 4(b). A sentencing court may impose a sentence outside the range established by the applicable guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). The sentencing court may depart upward only when the Guidelines' computation of the sentence does not adequately take into consideration the circumstances of the case. *United States v. Kikumura*, 918 F.2d 1084, 1104 (3d Cir. 1990).

The applicable guideline for interstate threats, § 2A6.1, specifically acknowledges the potential inadequacy of the Guidelines in certain situations.

> The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the

potentially relevant circumstances in the offense level. Factors not incorporated in the guidelines may be considered by the court in determining whether a departure from the guidelines is warranted. *See* Chapter Five, Part K (Departures).

Application Note 1 to § 2A6.1. Pursuant to §§ 5K2.3[3] and 5K2.8,[4] the Government seeks the following upward

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3. Section 5K2.3 provides:

> If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.
>
> Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim when the impairment is likely to be of an extended or continuous duration, and when impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

4. Section 5K2.8 states:

> If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase

(Cont'd)

departures: (1) 3 points for extreme conduct and psychological harm suffered by one of the victims, GW; (2) 3 points for the extreme conduct and psychological harm suffered by victim LB; and (3) 1 point for extreme conduct and psychological harm suffered by each of the victims MJ and SK. Therefore, the Government seeks an additional 8 point base offense level increase.[5]

1. *Psychological Injury*

Defendant objects to an upward departure for psychological injury contending that while he caused suffering to his victims, the harm which resulted was no more than that reasonably expected upon receipt of threats of bodily injury or death. He maintains that the victims' attempts to hide from him, conceal their telephone numbers, and to take measures to be more secure are precisely the type of reaction to be expected from recipients of such threats. According to Defendant, an upward departure is not appropriate because there is no frame of reference to determine what constitutes the "normal" psychological injury that results from receiving threats.

(Cont'd)

> the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

5. Because the Government seeks an 8 point upward departure calculated from the total base offense level of 25 that it argues applies, *see* discussion *supra*, the Government seeks a final offense level of 33.

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Defendant's contentions are not persuasive; his repeated attempts to harass and intimidate his victims and the resulting the psychological injury suffered by those victims are not adequately considered by the Guidelines. Therefore, the Court finds that the Government has established by clear and convincing evidence, that an upward departure pursuant to § 5K2.3 is appropriate with respect to victims GW and LB. *See United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990) ("if the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as 'a tail which wags the dog of the substantive offense,' . . . the factfinding underlying that departure must be established at least by clear and convincing evidence." (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)). Contrary to Defendant's contentions, the chronic and substantial psychological impairment suffered by those victims as a result of Defendant's ceaseless acts of terror in the form of vandalism, harassment, and threats, have been sufficiently detailed by the Government and in the PSR. While the reactions elicited by Defendant's conduct may have included some less extreme reactions, such as changing a telephone number, they also evoked responses that exhibit far more serious psychological injury. *See* PSR § 33. In *Morrison*, 153 F.3d 34, the Second Circuit affirmed the district court's decision to award a fourteen level upward departure for extreme conduct and extreme psychological injury because the defendant caused the victim to change homes and jobs, consider leaving the country, isolate herself from friends and family, and to significantly change her personality making her suspicious and extremely reclusive. *Id.* at 53.

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Defendant argues that the conduct of the defendant in *Morrison* was "much more egregious and much more systematically implemented in order to chase the victim across the country and to ruin her life." Def.'s Opp'n at 7, n.7. The Court disagrees with Defendant. Here, Defendant's conduct was also systematically implemented and paralleled that of the defendant in *Morrison*. One of the victims, LB, testified that she left her job and moved twice since Defendant began to terrorize her — once out of state, and a second time four months later "for fear that he was finding me." Trial Tr. Vol. 2, at 43. In LB's own words, Defendant "destroyed [her] life and [her] sanity." PSR ¶ 78. As set forth in § 33 of the PSR, as a result of Defendant's harassment and terrorism,

> [a]ll victims sought safety measures to protect themselves against the defendant ranging from the installation of home security systems to relocating out of the area. Many have suffered physically and mentally, resulting in medical treatment for some of the victims. One victim rarely goes outside her home alone, and is even fearful of her own yard. Another victim's family members will not allow her in their homes, since they fear their association with the victim would make them likely targets for Van Wyk. Another victim considered adopting a baby, but feared that the child would be in danger after the defendant's release from prison.

As another example, although GW installed an elaborate alarm system in her home, she feared gardening in her own

yard or sitting by her pool without her husband, she would walk out to her car each morning shaking, "not knowing if it was going to be in a driveable condition," Trial Tr., Vol. 1, at 30, and she would essentially stay in her house if her husband was not around. GW also testified that she had to seek medical help due to poor health caused by the stress Defendant caused her. Trial Tr., Vol. 1, at 54.

The Court finds that the evidence fully justifies an upward departure for psychological injury suffered by victims GW and LB; however, the Court declines to grant the Government's request for 3 point adjustment for psychological injury to *each* of the victims, GW and LB. *See e.g.*, *United States v. Helbling*, 209 F.3d 226, 251-52 (3d Cir. 2000) (affirming a total 2 level upward departure for infliction of extreme psychological injury on elderly victims of stockbroker fraud because victims suffered the humiliation of being forced to seek work at an advanced age and rely on help from family members, the trauma that comes with losing one's savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from the tax authorities); *United States v. Astorri*, 923 F.2d 1052, 1058-59 (3d Cir. 1991) (affirming 2 level upward departure, pursuant to § 5K2.3, for infliction of extreme psychological injury on elderly victims of stockbroker fraud). As in *Helbling* and *Astorri*, despite the fact that more than one victim was involved, the Court will upwardly depart a total of 3 counts for psychological injuries suffered by GW and LB.

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2. *Extreme Conduct*

Defendant also claims that while his conduct was "certainly not acceptable, they do not rise to the level of 'extreme' conduct." Def.'s Opp'n, at 8. He argues that his communications were not "unusually heinous, cruel, brutal, or degrading" when measured against the examples of extreme conduct listed in the Guidelines — torture, "gratuitous infliction of injury, or prolonging of pain or humiliation."

The Court finds, however, that the Government has shown by clear and convincing evidence that Defendant's repeated harassment and intimidation of GW and LB constitute extreme conduct that was not adequately considered by the Guidelines. Defendant prolonged GW's pain and humiliation when, over the course of *fifteen* years, Defendant vandalized GW's home and cars, made hundreds of harassing telephone calls to GW's home and office, wrote letters to GW's employer disparaging GW's conduct, left GW messages relating to her deceased mother in a haunting tone, wrote letters to GW's husband, wrote GW threatening letters containing personal information, and sent items to GW's home such as sexual enhancement drugs and threats. The extended duration and the myriad of ways in which Defendant harassed GW and instilled fear in her justify an upward departure. *See United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996) (affirming 8 level increase where the defendant harassed victim for 20 years); *see also United States v. Pergola*, 930 F.2d 216 (2d Cir. 1991).

Similarly, Defendant also persistently caused LB prolonged pain and humiliation over an extended period of

time. Shortly after LB and Defendant met in November 1995, Defendant began leaving LB telephone messages, vandalizing her car, and sending her harassing letters. Defendant spray painted on LB's neighbor's garage doors, LB's name and a profane comment. Recently, Defendant mailed a letter to LB's friend indicating that he had passed LB's journal around the prison for other inmates to read.

With respect to SK, after Defendant first met her in early 1994, Defendant sent SK a letter threatening to make a scene at SK's place of work; she also received harassing phone calls from Defendant from 1994 to December 1997, when SK changed her telephone number. In March of 1994, Defendant wrote a letter to SK's boyfriend stating that SK was cheating on him with "Roy." Then in July of 1997, SK's car was vandalized. The tires were flattened and the paint was scraped with a sharp object. The word "bitch" was carved into the front hood of the car. Finally, in August 1997, one of SK's neighbors received a telephone call from a person cautioning that SK had access to personal information about the neighbor that she might misuse.

Because of Defendant's relentless and prolonged harassment of his victims over the course of many years, the Court will grant a total 2 level upward departure for extreme conduct.

Therefore, the total offense level adjusted for extreme conduct and psychological injury is 30 (25 base offense level + 3 for psychological injury + 2 for extreme conduct).

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D. *Criminal History Category*

The PSR calculates that Defendant's criminal history points total 12, placing Defendant in a criminal history category of V.

1. *Defendant's Objections to Calculation of Criminal History Points*

Defendant argues that in arriving at category V, 7 of the 12 criminal history points were erroneously taken into account by Probation.

U.S.S.G. § 4A1.2(e) governs the applicable time period of prior sentences that may be included in determining criminal history points. Subsection (2) provides that "[a]ny other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted." As noted in Application Note 8, "the term 'commencement of the instant offense' includes any relevant conduct" and cites to § 1B1.3. Pursuant to § 1B1.3(a)(2), conduct that occurred within ten years of January 1993[6] can be deemed as relevant conduct if it is "part of the same course of conduct or common scheme or plan as the offense of conviction." In order to qualify as "part of a common scheme or plan," two or more offenses "must be substantially connected to each other by *at least one common factor, such as common victims*, common accomplices, common purpose, or similar *modus operandi*." Application Note 9(A) to § 1B1.3 (emphasis added).

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6. Count One of the indictment, of which Defendant was convicted, provides that the threatening interstate communications commenced in January 1993.

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Defendant maintains that pursuant to § 4A1.2(e), only those convictions that occurred within the ten year period preceding the commencement of illegal activity in January 1993 set forth in Count One can be counted.[7] He argues that any pre-1983 harassment is not relevant because the dissimilarities in conduct outweigh the similarities and because of the time lapse between the various acts of vandalism in 1984 and the harassment that commenced again in 1993. Probation, however, states that Defendant's "commencement of the instant offense" was in 1984 when he started vandalizing GW's car. Probation is correct.

Despite the period in which Defendant was in state prison during which he did not harass GW, Defendant cannot, and does not, dispute that the various acts of vandalism in 1984 are substantially connected to the countless episodes of harassment Defendant began in January 1993 by at least one factor — a common victim, GW. Therefore, even if, as Defendant insists, there is no similar modus operandi, the 1984 incidents are part of a "common scheme or plan as the offense of conviction" and are thus deemed as relevant

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7. Even under Defendant's calculation that the applicable time period begins within ten years of January 1993, Defendant's objection to 3 of the 7 disputed points is erroneous. Defendant is incorrect to include *convictions* that occurred within the applicable time frame; rather, in accordance with the express terms of § 4A1.2(e)(2), *sentences* that were imposed within the applicable time period must be included. As a result, the 1 point for his sentence imposed on April 6, 1983 for theft of movable property is within the ten year frame beginning in January 1983. *See* PSR ¶ 94. Additionally, the 2 points for Defendant's June 3, 1983 sentence for theft and criminal mischief is also proper even under Defendant's calculation of the applicable time frame.

conduct.[8] Accordingly, any sentences imposed within ten years of the 1984 "commencement of the instant offense" are properly counted.

2. *Increase of Criminal History Category*

The Government requests that Defendant be placed in criminal history category VI for under-represented criminal history.[9] Section 4A1.3 provides that "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes," the Court may depart from the

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8. Defendant relies on *United States v. Cedeno-Rojas*, 999 F.2d 1175, 1180 (7th Cir. 1993) in which the court recognized that it "must be cautious and exacting in permitting such relatively stale dealings to be included in the same course of conduct as the offense of conviction." *Cedeno-Rojas* is inapposite to this case. First, the Seventh Circuit was addressing the issue of whether offenses were sufficiently related to constitute the "same" course of conduct, rather than a "common scheme or plan." Further, in that case, the Circuit was determining relevant conduct to determine whether the district court had erred in calculating the base offense level. Here, however, the Court is examining relevant conduct to ascertain Defendant's "commencement of the instant offense" for purposes of calculating criminal history points.

9. Based on the Government's proposed total offense level of 33 and a criminal history category of VI, the guideline range would be 235-293 months. Without an increase in criminal history category, the sentencing range would be 210-262. Because the maximum penalties for the offenses with which Defendant was convicted is 25 years, the Government requests a sentence of 293 months.

applicable guideline range." In making this determination, the Court must compare "the frequency and seriousness of the conduct comprising the defendant's criminal history with the conduct of others who fall into each category." *United States v. Harris*, 44 F.3d 1206, 1212-13 (3d. Cir.), *cert. denied*, 514 U.S. 1088 (1995).

Applying these principles to the facts of this case, the Government contends that Defendant should be sentenced at criminal history level VI because in addition to convictions for criminal trespass, theft, possession of marijuana, and making obscene telephone calls, Defendant was also arrested on numerous other charges including retaliation against a witness, assault on a police officer, threats to kill, witness tampering, and stabbing another individual. PSR ¶¶ 109-20.

The charges for which Defendant was convicted were already counted towards calculating Defendant's criminal history points; therefore, the 12 point criminal history does not under-represent those convictions. With respect to Defendant's history of other arrests, § 4A1.3 expressly prohibits the consideration of a prior arrest record itself. Moreover, "most pertinent sentencing facts need only be established by a preponderance of the evidence," *Kikumura*, 918 F.2d at 1099, unless "the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as 'a tail which wags the dog of the substantive offense.' " *Id.* at 1101 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)). Here, as stated in the PSR, Defendant was acquitted of the stabbing charge and the remainder of the charges were either dismissed, are pending, or the outcome was unknown by Probation.

Therefore, the Government has not established by any burden of proof, that Defendant actually was guilty of the charges for which he was arrested.

Accordingly, the Government's request for an upward departure from the applicable guideline range for underrepresented criminal history is **denied.**

III. *CONCLUSION*

The total offense level is adjusted as follows.

Summary of Total Offense Level

	GROUP 1 (GW)	**GROUP 2 (MJ)**	**GROUP 3 (Firearm)**
Base Offense Level:	12 27-33	12 27-33	20 63-78
Specific Offense Characteristic: (Intent to Carry Out Threat)	+6 51-63	+6 51-63	0
Specific Offense Characteristic: (More than 2 Threats)	+2 63-78	0	0
Specific Offense Characteristic: (Violation of Court Order)	0	+2 63-78	0
Victim Related Adjustments:	0	0	0

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Adjustments for Role In the Offense:	0	0	0
Adjustment for Obstruction of Justice:	+2	0	0
Adjusted Offense Level:	22 77-96	20 63-78	20 63-78

Total Offense Level (*See* § 3D1.4):	25 100-125
Psychological Injury	+3 130-162
Extreme Conduct	+2
Adjusted Offense Level after Upward Departure	30 151-188

The Court declines to increase Defendant's criminal history category; V is the appropriate category. Under Chapter 5, Part A of the guidelines, Defendant's offense level and his criminal history rating of V determines the Guideline range for imprisonment to be 151-188 months. Neither restitution nor fines will be imposed.

So Ordered.

Dated: 9/19/2000

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 8, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Crim. No. 99-217 (WGB)

UNITED STATES OF AMERICA,

v.

ROY VAN WYK,

Defendant.

ORDER

This matter having come before the Court on Defendant's *in limine* motion to exclude the proposed expert testimony of FBI Special Agent James R. Fitzgerald; and

The Court having considered the submissions of the parties; and

The Court having heard oral argument from the parties on February 3, 2000 and February 4, 2000; and

For the reasons set forth in the Court's Opinion issued this day; and

For good cause shown;

It is on this the 8th day of February, 2000 hereby ORDERED that Defendant's motion *in limine* is **granted in part and denied in part;** and

Appendix E

IT IS FURTHER ORDERED that Agent Fitzgerald may testify to the comparison of characteristics or "markers" between the handwritten and typed writings, of which Defendant is known to be the author, and the handwritten and typed writings, of which authorship is "questioned" or unknown; and

IT IS FURTHER ORDERED that Fitzgerald's testimony regarding any "external" or extrinsic factors and his conclusion as to the author of the "questioned" writings are barred.

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 8, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. Crim. 99-217(WGB)

UNITED STATES OF AMERICA,

v.

ROY VAN WYK,

Defendant.

Feb. 8, 2000.

* * *

OPINION

BASSLER, District Judge.

This opinion addresses the question whether an agent of the FBI can testify as a forensic stylistic expert and whether forensic stylistics is a reliable technique to allow the expert to identify Defendant as the author of unidentified threatening letters.

This matter comes before the Court on the Defendant's *in limine* motion to exclude the testimony of the Government's expert witness FBI Special Agent James R. Fitzgerald

("Fitzgerald" or "Agent Fitzgerald"). For the reasons set forth below, the Court grants in part Defendant's motion to exclude Fitzgerald's testimony by limiting his testimony to the comparison of characteristics or "markers" between handwritten and typed writings, in which Defendant is known to be the author ("known writings") and the handwritten and typed writings, in which authorship is "questioned" or unknown ("questioned writings"). Fitzgerald's testimony regarding any "external" or extrinsic factors and his conclusion as to the author of the "questioned" writings are barred.

I. *BACKGROUND*

Defendant Roy Van Wyk ("Defendant") has been charged with a four count Superseding Indictment. Count One alleges that from January 1993 through December 1998, Defendant conspired to make threatening communications in violation of 18 U.S.C. § 875. Counts Two and Three allege two specific instances of threatening communications made to victims "MJ" and "GW." Count Four charges Defendant with possession of a firearm by a convicted felon in violation of Title 18 U.S.C. § 922(g)(1) and (2).[1]

Defendant seeks to exclude the proposed expert testimony of Agent Fitzgerald. Fitzgerald testified at a F.R.E.Rule 104 evidentiary hearing on February 3, 2000.[2] The Government presents Agent Fitzgerald as an expert in

1. By Order dated January 12, 2000, the Court severed Count Four from the other counts.

2. On February 4, 2000, after the conclusion of a jury charge conference, counsel made additional arguments as to the admissibility of Agent Fitzgerald's testimony.

forensic stylistics,[3] an area of scientific expertise which the Government has conceded is novel. (February 3, 2000 Hearing Transcript ("Hearing Tr."), at 179.) Forensic stylistics is the examination of writing style "for the express purpose of resolving litigated questions related to disputed authorship or meaning." McMenamin, G. *Forensic Stylistics,* 58 Forensic Science Int'l, 1, 45 (1993) (hereinafter "McMenamin article"). More specifically,

> [i]n cases of disputed authorship, the linguist analyzes and describes the style of writing of a document of questioned authorship and compares and contrasts its language to that of documents known to be written by a given author.

Id. at 3.

For purposes of this motion, it is helpful to divide Fitzgerald's opinion into three components: (1) internal evidence, which is actual comparisons of similarities or "markers" within the "four corners"[4] of the known and

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3. At oral argument on February 4, 2000, the Government withdrew its proffer of Agent Fitzgerald as an expert in forensic stylistics and instead proffered him as an expert in text analysis. Forensic stylistics and text analysis both involve the examination of text or writing style; the only difference that the Court can glean between forensic stylistics and text analysis is that forensic stylistics is specifically geared towards resolving litigated questions related to disputed authorship or meaning.

4. The four primary categories are: punctuation, orthography or spelling, grammar, and "other." Hearing Tr. at 130. For example, (Cont'd)

questioned writings; (2) external or extratextual evidence, such as "known dates of composition, date and location of mailing, DNA evidence, and the like";[5] and (3) opinion that the author of all the questioned writings is the same individual and that Defendant is that author.

Defendant argues that Agent Fitzgerald is not qualified to testify as a forensic stylistics expert. Defendant notes that no expert has yet testified in the area of linguistic stylistics, indicating its lack of reliability. Moreover, the jury is capable of comparing samples of writings without Fitzgerald's testimony.

II. *DISCUSSION*

A. *Standard Governing Admissibility of Expert Opinions*

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

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(Cont'd)
in some of the questioned typed writings, Fitzgerald notes that with respect to the use of an apostrophe in a possessive word or in a contraction, the writer either completely omits the apostrophe or instead substitutes improper punctuation, such as a comma or quotation mark. Fitzgerald Report, at 10-11.

5. Fitzgerald Report, at 2.

> issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702. The Rule therefore has three fundamental requirements: (1) the proffered witness must qualify as an expert by knowledge, skill, experience, training, or education; (2) the expert must testify to scientific, technical, or other specialized knowledge; and (3) the expert's testimony must assist the trier of fact. *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir.1995). When faced with a proffer of expert testimony, the court must make a preliminary determination as to all of these Rule 702 requirements. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The Third Circuit has interpreted the first requirement of Rule 702 liberally. *See e.g., In Re Paoli R.R. Yard PCB Litig.* ("*Paoli I*"), 916 F.2d 829, 855 (3d Cir.1990) (exclusion is not proper remedy simply because experts did not have degree or training that district court thought would be most appropriate). "We have eschewed imposing overly rigorous requirements of expertise and have been satisfied with more generalized qualifications." *In Re Paoli R.R. Yard PCB Litigation* ("*Paoli II*"), 35 F.3d 717, 741 (3d Cir.1994); *see Hammond v. International Harvester Co.*, 691 F.2d 646, 652-53 (3d Cir.1982) (holding that an engineer, whose only qualifications were sales experience in field of automotive and agricultural equipment and teaching high school automobile repair, nevertheless could testify in products liability action involving tractors); *Knight v. Otis Elevator*

Co., 596 F.2d 84, 87-88 (3d Cir.1979) (holding that expert could testify that unguarded elevator buttons constituted design defect despite expert's lack of specific background in design and manufacture of elevators).

The proposed expert must possess knowledge, skill, experience, training, *or* education in the area of his or her testimony greater than the average layperson. *See Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 114 (3d Cir.1987); *Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp., A.G.*, 1992 WL 211554, at *20 (E.D.Pa. Aug.24, 1992). The proposed expert "should not be required to satisfy an overly narrow test of his own qualifications." *Gardner v. General Motors Corp.*, 507 F.2d 525, 528 (10th Cir.1974); *see also DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 956 (3d Cir.1990) ("Rules 701-703 relating to expert testimony provide for the admission of evidence with any marginal utility absent a substantial countervailing concern.") The expert need not have complete knowledge about the field in question, need not be certain, and need not be unbiased. 3 *Weinstein's Evidence*, § 702[4]. The expert must only be able to aid the jury in resolving a relevant issue. While the level of expertise may affect the weight to be accorded the expert's opinion, it does not affect admissibility.

The Third Circuit has held that it is an "abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir.1996) (reversing district court for excluding testimony of plaintiff's expert regarding alleged causes of mesothelioma in asbestos case).

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"The second requirement of Rule 702 — that the expert testify to scientific, technical or other specialized knowledge — is intended to ensure the reliability or trustworthiness of the expert's testimony." *Velasquez*, 64 F.3d at 849 (citing *Daubert*, 509 U.S. at 590-91, 113 S.Ct. 2786). An expert's opinion must be "reliable," that is, based on valid reasoning and reliable methodology, as opposed to "subjective belief or unsupported speculation." *Kannankeril v. Terminix Int'l*, 128 F.3d 802, 806 (3d Cir.1997) (citations omitted). "[I]f an expert opinion is based on speculation or conjecture, it may be stricken." *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 75 (3d Cir.1996). Expert testimony cannot be based on "pure speculation, rather than reasonable inference." *Fedorczyk*, 82 F.3d at 75.

When presented with a proffer of expert "scientific" testimony, the court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786. To do so, the court should consider the following factors, in addition to any other applicable factors: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods that have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses of the method. *Velasquez*, 64 F.3d at 850 n. 8 (citing *Paoli II*, 35 F.3d at 742 n. 8); *Daubert*, 509 U.S. at 593-95, 113 S.Ct. 2786.

Finally, the Court must consider the third requirement, whether the expert's testimony will "assist the trier of fact" to understand evidence or determine a fact in issue. This requirement goes primarily to relevance. *Daubert*, 509 U.S. at 591, 113 S.Ct. 2786. The proffered expert's testimony must "fit" under the facts of the case so that "it will aid the jury in resolving a factual dispute." *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir.1985)). *Daubert's* requirement that the court act as gatekeeper for expert testimony under F.R.E.Rule 104(a) "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999).

The party seeking to admit expert testimony "bears the burden of establishing its admissibility by a preponderance of proof." *Schmaltz v. Norfolk & Western Railway Co.*, 878 F.Supp. 1119, 1120 (N.D.Ill.1995) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir.1995)); *see also United States. Libutti*, 1994 WL 774646, at *1 (D.N.J. Feb.8, 1994) (noting that court had previously determined that defendant had not met his preliminary burden on proffered expert testimony).

In assessing a proffer of expert scientific testimony under F.R.E.Rule 702, the Court must also consider other applicable rules such as F.R.E.Rule 403, which "permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .' " *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. Because of the risk that

expert evidence can be powerful and quite misleading, " 'the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.' " *Ibid.* (citing J. Weinstein, *Rule 702 of The Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

B. *Analysis*

1. *Qualification as an Expert*

Agent Fitzgerald is a member of the National Center for the Analysis of Violent Crimes ("NCAVC") unit of the FBI Academy in Quantico, VA. *See* Fitzgerald Curriculum Vitae ("Fitzgerald CV"), at 1. He has been in that unit for about five years. *Ibid.* As evident from the name of the group, the NCAVC's role is to aid in solving violent crime or violent crime-related matters. Hearing Tr. at 110. Agent Fitzgerald does not have a degree in linguistics, forensic stylistics, or text analysis; he has a bachelor's degree in criminal justice and a master's degree in criminal justice administration. *Ibid.* He has, however, among other things, attended threat assessment, psychotherapy assessment, and risk assessment seminars that have involved matters related to the assessment of text, *id.* at 111-12, taught and conducted research in text analysis, *id.* at 115-19, analyzed text on a weekly or even daily basis during the course of his five years at NCAVC, *id.* at 113, and has worked on text analysis in a number of high profile matters including the Unabomber case. *Id.* at 121-27.

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Defendant contends that Fitzgerald is not qualified as an expert because he only began receiving specialized training in forensic stylistics in 1998, that he has attended only three seminars in this area, and that he has only performed between ten and twelve document analyses to determine authorship. Defendant's Supplemental Memorandum in Opposition to the Proposed Expert Testimony Of James Fitzgerald, at 13.

As evidenced by testimony during the evidentiary hearing, however, since 1998, Fitzgerald has had rather extensive experience in text analysis, having observed and studied text for years. He arguably qualifies as an "observational" expert because he has examined so many examples over an extended period of time. *Cf. United States v. Hines*, 55 F.Supp.2d 62, 69 (D.Mass.1999). Because the expert need not have complete knowledge about the field in question, Fitzgerald qualifies as an expert in text analysis under the flexible requirements of *Daubert*, *Kumho*, and *Paoli II*.

Defendant is, of course, entitled to cross-examine Fitzgerald vigorously as to his expertise, or alleged lack thereof, and to his methods used to reach his conclusions. These issues more properly go to the credibility of Fitzgerald's testimony and the weight the jury should give it, rather than to its admissibility. *See Gisriel v. Uniroyal Inc.*, 517 F.2d 699, 702 (8th Cir.1975).

2. *Reliable Scientific Testimony Aiding the Jury*

Defendant also claims that the proffered expert testimony is subjective, unreliable, and lacks measurable standards.

Unfortunately, no case law,[6] treatise, or law review article has dealt with this precise issue of whether the examination of text analysis to resolve a litigated question related to disputed authorship or meaning, or forensic stylistics, constitutes sufficiently reliable scientific evidence admissible in court.

Under the *Daubert* standard, one of the pertinent considerations in determining whether a theory or technique is scientific knowledge that will assist the trier of fact is whether the theory or technique has been subject to peer review and publication. Publication is but one element of peer review. *Daubert,* 509 U.S. at 593, 113 S.Ct. 2786.

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6. The Court is aware of only three cases in which forensic stylistics has been addressed. In the first case, *United States v. Clifford,* 704 F.2d 86 (3d Cir.1983), the government did not proffer the testimony of its forensic linguistic expert acknowledging that at that time, forensic linguistic analysis was used only for investigative purposes because it was not a positive means of identification. In another case, *United States v. Salameh,* 54 F.Supp.2d 236 (S.D.N.Y.1999), the defendants sought new trials, arguing among other things, that the testimony of an expert on linguistic style would have been helpful to the defense; the court rejected that argument, concluding that such proposed testimony was "both immaterial and speculative and would not have been admitted into evidence." *Id.* at 251. The court did not further explain that conclusion. The third decision is an opinion by the California State Personnel Board, *In the Matter of the Appeal by Amarjit (Jack) Saluja,* No. 94-16 (May 2-3, 1994), which can be found at *www.spb.ca.gov/spblaw/pdsindx.htm.* In that case, the Board credited the expert testimony of Dr. Gerald McMenamin in finding that certain anonymous letters were written by an employee of the California Water Resources Control Board.

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Although it is not dispositive of admissibility, publication in a peer reviewed journal is relevant "in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594, 113 S.Ct. 2786.

The Government has cited to one publication[7] dealing with forensic stylistics — the McMenamin article.[8] That article explains:

> [l]inguistics is a well established scientific discipline with a long history of inquiry, and linguistic stylistics is the field within this discipline that studies variation in written language . . . Stylistics is an applied science in two senses. It first requires an application of formal linguistic theory to empirical (fact-finding) linguistics, and second involves application of factual linguistics to the "applied" field of stylistics, thus fulfilling human purposes related to text description and interpretation or author identification.

McMenamin article, at 48. "To the extent that variation in written language can be measured, stylistics incorporates

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7. Although the Government also states that a chapter on forensic stylistics in included in a treatise by Cyril H. Hecht, entitled *Forensic Sciences*, it has not yet been able to obtain a copy of that treatise.

8. The same text has also been published in a book entitled *Forensic Stylistics*.

statistics." *Id.* at 50.[9] According to the McMenamin article, the results of stylistic analysis can be precise, coherent, and relatively complete; additionally, when objective stylistic analysis is restricted to demonstrable or measurable facts, it will produce reliable results. McMenamin article, at 48-49. The McMenamin article also notes that there is not one generally accepted technique of stylistic analysis; the decision depends largely on the data presented. *Id.* at 49. Furthermore, although there are those in the scientific community who view the concept of style as defying analysis, "the scientific community overwhelmingly accepts that style is present in all written texts and that it can be observed, described, and analyzed." *Id.* at 50. Due, however, to the dearth of published cases or journals addressing forensic stylistics, the novelty of this field, and the fact that it has only been approved by law enforcement, the Court has no way of determining whether the McMenamin article is merely self-legitimized.[10]

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9. In *Clifford*, 704 F.2d at 90, the forensic expert, who the government did not call, relied on computer programs in order to identify similarities in writings. That is not the case here. Agent Fitzgerald has not relied on the use of any statistics.

10. The following quote from the McMenamin article does little to instill confidence in the reliability of the Agent's opinion as to authorship:

> There is strong practical and theoretical motivation to combine available methodologies in the analysis of style. From the researcher's perspective, the obligation to explain his or her method and findings leads to conclusions that are "*not so much objective as they are*

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Fitzgerald testified to the specific methodology he uses in determining authorship. First, he normally separates and catalogs the writings either chronologically or by victim. Hearing Tr. at 132. In this case, because there were handwritten and typewritten writings, he divided them into four categories: Known Typings ("KT"), Known Writings ("KW"), Questioned Typings ("QT"), and Questioned Writings ("QW"). *Ibid.* Then he read the twenty-two letters to obtain a sense for the "feel" of the writings. *Ibid.* Third, he color coded the issues contained in the writings into four categories: (1) punctuation and spelling; (2) threat; (3) interesting phrases; and (4) correct or incorrect "trip" phrases such as use of "there" or "their," use of "to," "two," or "too," and "your," or "you're." *Id.* at 133-34. Next, Fitzgerald created a chart and determined whether a particular word, abbreviation, or phrase was used correctly or was an idiosyncracy. *Id.* at 134. His results were reviewed by two other law enforcement officers. *Id.* at 114. No sources outside the FBI have reviewed his reports. *Id.* at 157.

Although Fitzgerald employed a particular methodology that may be subject to testing, neither Fitzgerald nor the

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> *'intersubjective.'* " (Ross 1973:3). With respect to the linguistic data itself, the study of stylistic variation mediates (in a relation of complementarity) between the non-measurable (qualitative) linguistic variables, which are the rules of language, and the measurable (quantifiable) frequencies of occurrence of units exemplifying the values of those linguistic variables (Itkonen 1980:363) (emphasis added).

McMenamin article, at 170.

Government has been able to identify a known rate of error, establish what amount of samples is necessary for an expert to be able to reach a conclusion as to probability of authorship, or pinpoint any meaningful peer review. Additionally, as Defendant argues, there is no universally recognized standard for certifying an individual as an expert in forensic stylistics.

Various judicial decisions regarding handwriting analysis, while not identical to text analysis, are instructive because handwriting analysis seems to suffer similar weakness in scientific reliability, namely the following: no known error rate, no professional or academic degrees in the field, no meaningful peer review, and no agreement as to how many exemplars are required to establish the probability of authorship. *See Hines*, 55 F.Supp.2d at 69; *United States v. Santillan*, 1999 WL 1201765, at *2 (N.D.Cal. Dec.3, 1999); *United States v. McVeigh*, 1997 WL 47724 (D.Colo.Trans. Feb. 5, 1997).

In *Hines*, the court permitted the government's handwriting expert to testify regarding the similarities and dissimilarities between the defendant's handwriting and handwriting on a robbery note, but did not allow the expert to testify to the identity of the defendant as the author of the robbery note. In so holding, the court recognized not only the lack of reliability of the handwriting expert testimony, e.g. no known rate of error or established standard, but also that the jury could easily evaluate on its own the similarities between the handwriting samples. The court noted, "[t]his is not rocket science, or higher math." *Hines*, 55 F.Supp.2d at 70. Nevertheless, the court was unwilling to disallow expert testimony altogether because the handwriting expert testimony

> involves more than just identifying what is similar and what is different in the same way a lay person would. It involves taking the next step — that this or that similarity matters, that it equals a general pattern. Presumably, the expert is helped in drawing general patterns by the numbers of exemplars she has seen, just like the spouse identifies the husband's handwriting because she has seen it numbers of times.

Id. at 70 n. 21. The court determined, however, that the expert's conclusion of authorship would be extraordinarily prejudicial. In its analysis, it noted that the court in *United States v. McVeigh*, 1997 WL 47724 (D.Colo.Trans. Feb. 5, 1997) was faced with a similar issue. In *McVeigh*, the court stated:

> "there is a great difference between a witness who has the requisite training and skill saying, 'Look, I've compared this handwriting on this exhibit with this exemplar and I've used the techniques of microscoping (sic) and, you know, all of those things that are often involved in that kind of comparison, and these are the things I find,' and 'I see these similarities and these dissimilarities and so forth' but does not go on to reach any sort of ultimate conclusion that this was written by the same person or expresses some probability or degree of confidence. The problem with . . . handwriting is that there is no testing of the — no verification-type testing of these opinion results; and in addition, there has never been

> within the discipline of people who practice this skill — there has never been any agreement on how to express the results. There is no standardized nomenclature, you know. Therefore, it seems to me that we should draw the distinction between somebody getting on the stand and saying 'Yeah, written by the same person,' or 'no, not written by the same person,' vs. 'these are the similarities or these are the dissimilarities'; and the jury can decide."

Id. at 70 (citing *McVeigh*, 1997 WL 47724, at *4).

In accordance with *Hines* and *McVeigh*, the district court for the Northern District of California, also ruled that the handwriting expert's testimony as to the "specific mechanics and characteristics of handwriting" was admissible. *Santillan*, 1999 WL 1201765, at *5. The court was satisfied that such testimony would "add to the general knowledge of lay persons and assist them to make comparisons of different examples of handwriting." *Ibid.* Yet, just as in *Hines* and *McVeigh*, the court did not permit the expert to testify regarding his subjective opinion as to who penned the unknown writings because, among other things, no tests or studies of the accuracy of such an opinion had yet been conducted. *Ibid.*; *but see United States v. Paul*, 175 F.3d 906, 911 (11th Cir.), *cert. denied*, __ U.S. __, 120 S.Ct. 535, 145 L.Ed.2d 415 (1999) (permitting handwriting expert to identify points of comparison between two writings and conclude that defendant was the author of both, but noting that jury was free to conduct own comparison and reach own conclusion regarding authorship of the unknown writing).

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i. *Fitzgerald's Opinion on Authorship of Writings*

The Court agrees with the rationale and approaches utilized in *Hines, McVeigh,* and *Santillan.* The reliability of text analysis, much like handwriting analysis, is questionable because, as discussed *supra,* there is no known rate of error, no recognized standard, no meaningful peer review, and no system of accrediting an individual as an expert in the field. Consequently, the existing data for forensic stylistics cannot definitively establish, as can DNA data, that a particular person is "the" author of a particular writing. *Cf. Hines,* 55 F.Supp.2d at 69. The Government has even conceded that while it disagrees with the results of the decision in *Hines, McVeigh,* and *Santillan,* the more cautious approach adopted by those courts may be appropriate given the lack of prior judicial approval of this area of expertise.

Because of the lack of scientific reliability of forensic stylistics, the Court is not satisfied that the jury would benefit from Fitzgerald's testimony as to his subjective opinion that the questioned writings were written by the same individual and that that individual is Defendant Roy Van Wyk. Moreover, the fact that such a conclusion comes from an "expert" may place more weight and credence on Fitzgerald's opinion than is warranted. Acknowledging Fitzgerald's opinion as that of an expert and FBI agent invests the opinion with an objectivity that this methodology does not support. In weighing its prejudicial effect compared to its probative value, exclusion is warranted. Because the opinion testimony is substantially more prejudicial than it would be probative, it should be excluded under F.R.E. Rule 403. Therefore,

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Agent Fitzgerald is not permitted to testify to his conclusion as to the identity of the author of the unknown writings.

ii. *Internal Evidence Testimony*

As the Government states, there can be no question that evidence of the known writings and unknown writings is admissible; courts uniformly have admitted evidence of known writings, recognizing that the particular or peculiar use of grammar and spelling, for example, can be observed and identified to establish authorship. *See Clifford,* 704 F.2d 86 (reversing trial court's decision and permitting evidence of the defendant's correspondence to show stylistic similarities between the correspondence known to belong to the defendant and the threatening letters, in order to show that defendant authored the threatening letters); *United States v. Campbell,* 732 F.2d 1017 (1st Cir.1984) (noting that misspelling a common word can be so much of a testimonial message that defendant's Fifth Amendment rights against self incrimination are triggered); *United States v. Pheaster,* 544 F.2d 353, 372 (9th Cir.1976), *cert. denied,* 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977) ("The manner of spelling a word is no less an identifying characteristic than the manner of crossing a 't' or looping an 'o'. All may tend to identify a defendant as the author of a writing without involving the content or message of what is written"); *United States v. Matos,* 990 F.Supp. 141, 144 (E.D.N.Y.1998) (holding Fifth Amendment privilege applies because requiring someone to state how he spells a word "may well serve to identify the person as the perpetrator of a crime.")

The question here is whether the Court may properly allow Agent Fitzgerald to testify as an expert regarding the

comparisons of markers between the known writings and questioned writings.[11] Defendant argues that Agent Fitzgerald's expert testimony will not be helpful in assisting the trier of fact. He argues that comparisons between the known and questioned writings could easily be drawn by the jurors and that such expert testimony would only overwhelm, confuse or mislead the jury. Unlike his opinion on authorship, Fitzgerald's expertise in text analysis can be helpful to the jury by facilitating the comparison of the documents, making distinctions, and sharing his experience as to how common or unique a particular "marker" or pattern is. *See Hines*, 55 F.Supp.2d at 69. Therefore, the Court is satisfied that Fitzgerald's testimony as to the specific similarities and idiosyncracies between the known writings and questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, he has seen a particular idiosyncrasy, will aid the jury in determining the authorship of the unknown writings. The internal evidence related to the "four corners" of the writings is admissible.

iii. *External Evidence Testimony*

Finally, Defendant objects that Agent Fitzgerald draws his conclusion not only from documents submitted to him, but also on "a review of the history of Van Wyk and the victimology of the four women who were recipients of one

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11. During the evidentiary hearing on February 3, 2000, defense counsel conceded that he would have no objection to Agent Fitzgerald testifying about the internal evidence. Hearing Tr. at 189. The next day, however, counsel for Defendant changed his position by withdrawing this concession.

or more of these documents." Fitzgerald report, at 15. That is, Defendant claims the proposed expert's opinion relies on "external" and background information, the sum of which is to cast Defendant as a "terrorizer" of women, or as a "very bad" person. Fitzgerald in effect states that Van Wyk is the author because he is the aggressor, whereas the issue is whether he is the aggressor because he is the author. The Court agrees with Defendant and finds that such external factors are actually "disguised" propensity evidence, which is prohibited by F.R.E. Rule 404(b). Accordingly, Fitzgerald's testimony regarding these external or extratextual factors is barred. The jury has already heard that evidence. For Fitzgerald to repeat it as an expert is highly prejudicial and F.R.E. Rule 403 also precludes it.

III. *Conclusion*

For the foregoing reasons, Defendant's motion *in limine* to exclude Fitzgerald's testimony is **granted in part;** Fitzgerald's expert testimony is limited to the comparison of characteristics or "markers" between writings known to have been authored by Defendant and the writings in which authorship is "questioned" or unknown. Fitzgerald's testimony regarding any "external" or extrinsic factors is barred as is his conclusion regarding the identity of the author of the "questioned" writings.

An appropriate Order follows.